

Northumbria Research Link

Citation: Slade, Jennifer and Grant, David (2010) The Consumer Protection from Unfair Trading Regulations: A Commentary (Part Two). *Travel Law Quarterly*, 2 (2). pp. 94-101. ISSN 1759-8982

Published by: Oakhurst Academic Press

URL:

This version was downloaded from Northumbria Research Link:
<http://nrl.northumbria.ac.uk/id/eprint/2189/>

Northumbria University has developed Northumbria Research Link (NRL) to enable users to access the University's research output. Copyright © and moral rights for items on NRL are retained by the individual author(s) and/or other copyright owners. Single copies of full items can be reproduced, displayed or performed, and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided the authors, title and full bibliographic details are given, as well as a hyperlink and/or URL to the original metadata page. The content must not be changed in any way. Full items must not be sold commercially in any format or medium without formal permission of the copyright holder. The full policy is available online: <http://nrl.northumbria.ac.uk/policies.html>

This document may differ from the final, published version of the research and has been made available online in accordance with publisher policies. To read and/or cite from the published version of the research, please visit the publisher's website (a subscription may be required.)



**Northumbria
University**
NEWCASTLE



UniversityLibrary

THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS: A COMMENTARY. PART TWO

Jennifer Slade and David Grant

This article is the second in a series on the Consumer Protection from Unfair Trading Regulations 2007 and how they apply to the travel industry.

Introduction

In this article we will examine some of the crucial definitions and terminology used in the Consumer Protection from Unfair Trading Regulations 2007 (SI 2008 No. 1277) ('CPR' for ease of reference). Consideration will be given to the meaning of 'consumer', 'average consumer', 'transactional decision' and 'materially distort the economic behaviour'. These definitions are all contained within Regulation 2 of the CPR and are technical in nature. The definitions comprise the 'building blocks' of the criminal offences created by the Regulations and are fundamental to an understanding of the law.

Consumer

A 'consumer' is defined in the CPR as:

any individual who in relation to a commercial practice is acting for purposes which are outside his business

This means that, for the purposes of these Regulations, a consumer is a person or persons acting in a private capacity. A consumer cannot be a business or someone acting on behalf of a

business, trade, craft or profession. At Recital 8 to the Unfair Commercial Practices Directive (2005/29/EC) ('Directive' for ease of reference) it is stated:

A business person booking a flight to attend a meeting in the course of their business would not fall within the definition of a 'consumer'

This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices.

In the travel industry this means that the consumer is the typical holidaymaker booking a package holiday or cruise for their summer break, someone purchasing a ticket on a flight or ferry to visit family abroad, a booking for a hotel room or other accommodation, even bookings for ancillaries such as car hire and attraction tickets. A business person booking a flight to attend a meeting in the course of their business or employment would not fall within the definition of a 'consumer' and therefore the CPR does not apply to this (rather large) category of travel industry customer.

'Consumer' is also defined in the Package Travel, Package Holidays and Package Tours Regulations 1992 (PTR), the Unfair Contract Terms Act 1977 (UCTA) and in that part of the Consumer Protection Act 1987 (CPA) relating to misleading prices which has now been repealed. What is important to note is that the new definition

under the CPR is different to those under the CPA, the PTR and UCTA. Under the CPA for instance the definition of a consumer was '*any person who might wish to be supplied for his own private use and consumption*'. At first glance this appears to protect only private consumers but it was interpreted to mean that no actual supply needed to be made – which meant that a trading standards officer could qualify as a 'consumer' under those provisions (see *Toys R Us v Gloucestershire CC* (1994) 158 JP 338). In the CPR the words 'might be' do not appear in the definition of consumer. In the CPR the consumer '*is acting*' which indicates that an actual supply has been or is being made. The important point here is that whilst the term 'consumer' is not a new one to the travel industry, none of these previous definitions have any bearing in relation to the CPR.

Only the definition of 'consumer' set out in Regulation 2 of the CPR can be considered when interpreting who is a consumer, and, by extension, the 'average consumer'.

Reference to the average consumer can be found in all of the prohibitions

Average Consumer

One of the most important definitions is that of the 'average consumer' which is set out in Regulation 2(2)-(6) of the CPR. A distinction is made between the 'average consumer' (Reg. 2(2)) and the average consumer who is a member of a 'particular group of consumers' (Reg. 2(3)) and the average consumer who is a member of a group of consumers who are 'particularly vulnerable' (Reg. 2(4) and (5)R).

Reference to the average consumer can be found in all of the prohibitions (Regulations 3–7). In Reg. 3(3)(b) it is stated that a commercial practice is unfair if:

it materially distorts or is likely to materially distort the economic behaviour of the

average consumer with regard to the product.

Under Reg. 5 a misleading action is one which:

deceives or is likely to deceive the average consumer

or it causes the average consumer to take a:

transactional decision he would not have taken otherwise

The latter wording also appears in Reg. 6 for what constitutes a misleading omission.

Aggressive commercial practices are defined in Reg. 7 and one exists if:

it significantly impairs or is likely to impair the average consumer's freedom of choice in relation to the product concerned through the use of harassment, coercion or undue influence; and

it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise.

In defining the average consumer Reg. 2(2) states:

In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.

Interestingly the definition of an average consumer appears in the CPR but it does not appear in the Directive itself. The basis of the

definition contained in the CPR does however derive its origin from the Directive. Recital 18 of the Directive does state:

... this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors as interpreted by the Court of Justice.

The latter part of this wording '*taking into account social, cultural and linguistic factors*' has been omitted from the definition in the CPR but at paragraph 14.32 of the Guidance published by the BERR (the Department for Business Enterprise and Regulatory Reform, now BIS, the Department for Business Innovation and Skills) the omitted wording is emphasised to expand upon what is meant by the 'notional average consumer'. This may indicate that whilst the wording does not appear in the CPR it will be taken into consideration when considering the application of the average consumer measure – in accordance with the principles of interpretation when considering European legislation.

The test for the average consumer is an objective one. It is not necessary to show that actual consumers have in reality been affected by an unfair commercial practice simply that they are likely or it is/was foreseeable that they may be. The average consumer is the representative for the whole population of consumers, the Joe Bloggs or 'man on the Clapham omnibus' who represents the average person in our society who is a consumer and not acting for commercial purposes. If the average consumer's 'material characteristics' include being 'reasonably well informed, reasonably observant and circumspect' (Reg. 2(2) CPR) then what does this mean? This will be considered further, later in this article.

The 'average targeted consumer' and the 'vulnerable consumer'

Two distinctions are made in the CPR to the average consumer generally. These are contained in Reg. 2 paragraphs (4) and (5) CPR. Regulation 2(4) CPR states:

In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, reference to the average consumer shall be read as referring to the average member of that group.

The average consumer who is an average member of a particular group of consumers is referred to as the 'average targeted consumer' in the Guidance (and hereafter for ease of reference). It is the characteristics and perspective of the average targeted

consumer that are relevant where a commercial practice is targeted or directed at a particular group of consumers. This could include for instance PGL holidays for children or Saga holidays for more mature holidaymakers. It could also include religious tourists, for example those going on the Hajj pilgrimage.

Regulation 2(5) goes on to state:

In determining the effect of a commercial practice on the average consumer –

Where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and

**It could also include
religious tourists**

Where the practice is likely to materially distort the economic behaviour only of that group,

A reference to the average consumer shall be read as referring to the average member of that group.

Here the test is that the vulnerability of that particular group could have been reasonably foreseen by a trader. This is again an objective test and it is not necessary for the trader to actually foresee the effect only that the trader could or should have reasonably foreseen it.

At paragraph 14.37 of the Guidance the meaning of vulnerable is considered. Mental or physical infirmity would include those suffering from impairment such as blindness or deafness, those confined to wheelchairs and other disabilities. The age can be either of the young or old, the categories no doubt particularly meant by these criteria are children and the elderly who can be particularly vulnerable for different but obvious reasons. Credulity covers:

... groups of consumers who may readily believe specific claims. The term is neutral, so the effect is to protect members of a group who are for any reason open to be influenced by certain claims (Para 14.37 of the Guidance).

Only vulnerability on the basis of infirmity, age or credulity is referred to in the Regulations so it appears no other vulnerability may be taken into consideration.

The result of this 'tiered' approach to identifying an average consumer is stated clearly in the Guidance (Para 14.31):

This means that different practices, and even the same practices in different circumstances, may be found to have

different effects depending on the type of consumer they reach or affect. However, this concept is intended to help the courts decide if a practice is prohibited due to the impact or potential impact it has on the relevant consumers. The provisions concerning vulnerable consumers are there to ensure that traders do not unfairly exploit vulnerable people where their practices might not change non-vulnerable consumers' decisions.

Who is the average consumer?

At Paragraph 14.32 of the Guidance it is stated:

Average does not mean a statistically average consumer.

Therefore, if the statistics show that the most typical consumer at an up market hotel chain such as Four Seasons is aged between 30-

50, has a high net worth income, is well travelled and is generally an experienced travel industry consumer, this will not equate to the 'average consumer'. The standard of the typical consumer at a Four Seasons hotel cannot be applied to ascertain who the average consumer is.

So if the average consumer is not an actual consumer who is the average consumer? As emphasised earlier, the average consumer is one who is 'reasonably well informed, reasonably observant and circumspect' but no further guidance is given on how to interpret this definition. These words have been considered before, most notably as a result of litigation in relation to trademarks and the issue of confusion, (as to this see *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* (Case C-342/97) [1999] ETMR 690 paragraph 26 and *Gut Springenheide and Tusky* (Case C-210/96) [1998] ECR I – 4657

Credulity covers groups of consumers who may readily believe specific claims

paragraph 31) but it is new terminology in the consumer protection field.

In considering the terms 'reasonably well informed' is a consumer who falls into that category experienced at booking and going on holidays or flights? Or are they simply expected to know things that are within the general knowledge of private consumers of the travel industry? The case of *R v Clarkson Holidays Ltd (1972) 57 Cr App R 38* dealt with an 'artist's impression' in a tour operator's brochure and whether it amounted to a 'false trade description' that the hotel and its facilities actually existed. A jury (of average consumers perhaps?) convicted the company. But almost 40 years have elapsed since that case was decided and in that time there has been a huge expansion of the whole travel industry market with more affordable options making travel much more commonplace than in the 1970s. As a consequence the travelling public is generally more sophisticated today, and this, coupled with a good dose of consumer scepticism could very well lead to a different result. Would a reasonably well informed travel consumer expect that where only an artist's impression is shown that the actual accommodation may actually look different, or have different or incomplete facilities? Particularly if that reasonably well informed consumer has been reasonably observant and circumspect and has read the terms and conditions highlighted at the back of the brochure? These questions have no straightforward answer at this stage, as without any authorities on the CPR the authors can only speculate that the answers may be different under these new Regulations. If 'social, cultural and linguistic factors' are also to be taken into account it is fair to say that it is likely the outcome of litigation would turn on its own facts each being determined by the particular factors taken into consideration.

The travelling public is
generally more
sophisticated today

If a commercial practice is aimed at a sector of a market rather than the whole market, the 'average targeted consumer' then the average consumer is considered within the context of that smaller grouping. For instance: a package holiday is put together with the theme of photography, for example a trip to Lake Garda with a tour itinerary particularly designed to maximise photographic opportunity of points of interest in the region perhaps with a tour guide. The package is then advertised in a magazine or other publication whose target audience/market sector is photography professionals, rather than in the tour operator's mainstream brochure. This would be when the test for an average targeted consumer would be relevant. The average person whilst still being reasonably well informed, reasonably observant and circumspect would have the characteristics of being an average

member of the group targeted
– in this example that would
be photography professionals.
So, being professionals would
it be reasonable to expect that
they would know what natural
lighting they would need to
obtain the type of photo(s)

they are expecting to achieve from the trip and that natural lighting changes dependent upon the weather and seasons? Would it therefore seem reasonable to expect that when a professional photographer books a package holiday of this nature off peak he can anticipate the kind of weather that can be expected during that off peak season which will inevitably reduce his opportunities for taking a picture of the lake with still waters, blue skies and a clear vista of the horizon. If so, it may not be necessary for the package tour operator to make explicit warnings with regard to the weather and natural lighting – the average targeted consumer, in this case professional photographers, cannot complain about being misled about the suitability of the weather; they are a sufficiently sophisticated group to know otherwise.

To take another scenario: a cheap skiing trip is advertised in a magazine or other publication aimed at professional, keen and experienced skiers for dates at the beginning and end of the skiing season. By virtue of the fact that the commercial practice targeted professional, keen and experienced skiers then the average targeted consumer test would apply. So if, as has happened in the past, there is insufficient snow in either or both of these 'shoulder' parts of the season would the average targeted consumer, in this instance, be able to complain about the lack of snow? Or at least, the lack of warning of the risk of no snow in the advertisement or brochure? Being an average member of the average targeted group who are professionals and experienced skiers and being reasonably well informed, observant and circumspect would they not be better informed and therefore be expected to know that the beginning and end of the season is risky, particularly as that is reflected in the cheap price?

This is an example of when the 'social, cultural and linguistic factors' may be very relevant

If a 'Pilgrimage to Mecca' package tour was put together and aimed at those wanting to undertake the Hajj this would be another example where the average targeted consumer measure would apply, but this is also an example of when the 'social, cultural and linguistic factors' may be very relevant. If the package has been put together and aimed at Muslims wanting to undertake the pilgrimage would the average member of the group expect, without explicit statements to the fact, for meals only to contain Halal meat? For their tour timetable to include appropriate breaks for prayer? That an Imam would be arranged to accompany them and or a guide experienced in performing the Hajj? Again, there are no answers to these questions but it is food for thought.

The third and final distinction of 'type' of average consumer is one that is the average member of a vulnerable group. The example given in the

guidance describes what might be a 'vulnerable group':

Consumers who need to use wheelchairs might be a vulnerable group in relation to advertising claims about ease of access to a holiday destination

Unlike with the averaged targeted consumer there appears to be no necessity to show that the vulnerable consumer has been targeted, so the advertisement may be contained in a tour operator's seasonal brochure for general consumption. The fact that claims or statements are made within the brochure which are only relevant to those in particular need of those provisions, such as access for wheelchairs, means that the claim is only applicable to the smaller group of the population to whom they are relevant. This definition is aimed at protecting those who, due to their vulnerability, may be in more need of protection than the average consumer who is not vulnerable.

To take a fanciful example: a group of aged, and ailing, nuns book a pilgrimage tour to Lourdes having considered literature in the tour operators' brochure which emphasised the miraculous healings that have taken place there, and giving the impression that modern pilgrims might also benefit from a visit. On return, none of them had experienced or even witnessed a miraculous healing and they are deeply dissatisfied by this. This could be an instance when the nuns may be considered 'vulnerable' as a result of their credulity – as devout Roman Catholic nuns, they were not worldly, they were innocents abroad and they trusted and relied on the marketing material as truth. It is unlikely that the average consumer would be affected in the same way but the average member of a vulnerable group would be affected differently. In order to establish that the average consumer in this circumstance was one that was the average member of the vulner-

able group it would need to be shown that the nuns were members of a 'clearly identifiable group of consumers' and that their vulnerability (in this case credulity) was reasonably foreseeable by the tour operator and that the commercial practice was 'likely to distort the economic behaviour only of that group'. If successful the question of whether the tour operator had breached any prohibitions or committed any offences would be considered from the perspective of the average consumer who is vulnerable.

Transactional decision

A 'transactional decision' is defined in the CPR at Reg. (2)(1) as:

... any decision taken by a consumer, whether it is to act or to refrain from action, concerning

Whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or

Whether, how and on what terms to exercise a contractual right in relation to a product.

The words in the CPRs derive from those found in the Directive itself. In the Guidance the phrase 'take a different decision' is used as shorthand for transactional decision which perhaps better describes what is meant by the definition of 'transactional decision'. At paragraph 14.23 of the Guidance a transactional decision is described as:

... an important concept covering a wide range of decisions that have been or may be taken by consumers in relation to products. This is wide in chronological scope, covering decisions taken before, during or after a contract is formed.

General examples included in the Guidance are whether to buy goods or services, to exercise a cancellation right, a right to a refund or replacement or a right in relation to an after-sales service.

So, if a consumer when booking a flight direct with the airline is informed that there are no seats remaining in coach and only first class is available, when this is in fact not the case, then this may be a misleading action, in breach of Regulation 5 'if it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise'. The transactional decision in this example may be that the misleading action causes the average consumer to purchase the first class tickets at the

higher price. Similarly when booking a hotel room either direct or as part of a package holiday, if a consumer is informed that only executive rooms remain available at the chosen accommodation (when in fact this is not the case) and these come at an added

supplement then this too would be a breach of Regulation 5.

It may very well be the case that airlines who informed passengers, in breach of EC Regulation 261/2004, that they cannot recover expenses for food and accommodation while stranded at foreign airports by the recent cloud of ash emanating from an Icelandic volcano, are committing a criminal offence if it causes those passengers not to pursue their rights.

Materially distort

The general prohibition of unfair commercial practices is contained in Regulation 3. The second part of the two part test (contained in Reg. 3(3)(b)) for ascertaining if a commercial practice is unfair is to consider if it:

A group of aged nuns book a pilgrimage to Lourdes

... materially distorts or is likely to distort the economic behaviour of the average consumer with regard to the product

The 'product' can be goods or services. 'Materially distort the economic behaviour' is defined in the CPR at Regulation (2)(1) as:

... in relation to an average consumer appreciably to impair the average consumer's ability to make an informed decision thereby causing him to take a transactional decision that he would not have taken otherwise.

This definition is imported from the Directive without amendment. The 'materially distort' test is concerned with whether the practice has actually or is likely to have the effect on the average consumers actions or decisions. The Guidance (Para 10.9) stipulates that:

The impairment must be significant enough to change the decisions the average consumer makes.

To use the earlier example of the purchase of a flight, this may also demonstrate material distortion. As part of the reservation process the consumer is told that the flights to the desired destination are limited and due to their popularity are selling very quickly. If such a statement could cause or is likely to cause the average consumer to purchase perhaps at a time before they would do so if emphasis had not been put on the fact that the flights were soon likely to become unavailable, and the statements are not true, then this would materially distort the economic behaviour of the average consumer. The consumer, who contacted reservations to buy two coach seats on

a flight, has in fact purchased two first class seats on a flight on an impulse due to relying on the statements made by the reservations team.

To take another example: an airline (Airline A) advertises flights to Rome for 99p which makes Airline A the cheapest, on the face of it, compared to other airlines. As a result of the advertised 'lead in' price a consumer opts to book flights to Rome with Airline A. But after 10 or so pages of the internet booking process and having invested 50 minutes of time the consumer is presented with a final price of £79.00. The consumer thinks that this may not be the most competitive price available but having reached this stage in the booking process decides they don't have time to go through the same process with each airline and commits to purchase with Airline A. The authors think that it is very possible that, if challenged, such an advertising practice could be deemed to materially distort the economic behaviour of the average consumer, by 'impair[ing] the average consumer's ability to

make an informed decision' and causing them to make a transactional decision that they would not otherwise have taken. The counter argument would no doubt be that such a practice of low lead in prices not equating to the actual final price is widely known about and that the average consumer would be aware of this. But would the average targeted consumer or the average consumer who is vulnerable be similarly aware?

In the next in this series of articles the following definitions will be considered in more detail: 'Business', 'Commercial practice', 'Invitation to purchase', 'Product', 'Professional diligence' and 'Trader'.

The impairment must be significant enough to change the decisions the average consumer makes
